(1)

89- 1457

No. 89-____

Supreme Court, U.S.
FILED
MAR 19 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

---

MARGARET MARY LIMONJA and
RAYMOND JAMES BROOKS,
*Petitioners,*

v.

COMMONWEALTH OF VIRGINIA,
*Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF VIRGINIA

---

MARVIN D. MILLER
1007 King Street
Alexandria, Virginia 22314
(703) 548-5000

THOMAS L. BARNEY
10 N. Meadow Street
Richmond, Virginia 23230
(804) 355-1476

*Counsel for Petitioners*

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

## QUESTION PRESENTED

I.

DO THE HOLDINGS IN TERRY, PLACE, AND SOKOLOW PERMIT TRAFFIC PATROLMEN WITH NO TRAINING AND LITTLE EXPERIENCE IN DRUG CASES TO HOLD TRAVELERS UNDER ARREST OR DETENTION FOR ABOUT AN HOUR WHILE THEY TRY TO LEARN THE CONTENTS OF A CLOSED, SEALED PACKAGE, WHICH IS THE SOLE FOCUS OF THEIR ATTENTION.

## TABLE OF CONTENTS

QUESTION PRESENTED ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES .....iii

OPINIONS BELOW ..... 1

JURISDICTION ..... 2

CONSTITUTIONAL PROVISION INVOLVED . 2

STATEMENT ..... 2

THE OPINIONS OF THE LOWER COURTS... 10

REASONS FOR GRANTING THE WRIT ..... 13

I. When Police Claim To Have Articulable Reasonable Suspicion Focused On A Closed, Sealed Package, They Must Use The Least Intrusive Means Available Which Permits Them To Hold The Package Briefly But Does Not Permit Them To Also Hold The Travelers.

II. A Traffic Patrolman With No Training And Little Experience In Drug Cases May Not Seize And Hold Travelers And Their Package Because One Traveler is Nervous and The Package is Ambiguously Labeled.

CONCLUSION ..... 26

APPENDIX A .....App 1

APPENDIX B ..... App 55

## TABLE OF AUTHORITIES


Arizona v. Hicks, 480 U.S. 321 (1987)..... 1, 8

Brinegar v. United States, 338 U.S. 160 (1949)..... 25, 26

Florida v. Royer, 460 U.S. 491 (1983)..... 22, 23

Illinois v. Gates, 462 U.S. 213 (1983)..... 26

Limonja v. Commonwealth, 383 S.E. 2d 476 (1989) (en banc)..... passim

National Teasury Employee's Union v. Von Rabb, 109 S.Ct. 1384 (1989)..... 17

Olmstead v. United States, 277 U.S. 438 (1928)..... 17

Reid v. Georgia, 448 U.S. 438 (1980)..... 22

Terry v. Ohio, 392 U.S. 1 (1968)..... passim

United States v. Alpert, 816 F.2d 958 (4th Cir. 1987)..... 15

United States v. Borys, 766 F.2d 304 (7th Cir.) cert. denied 474 U.S. 1082 (1985)..... 15, 16

United States v. Brignoni-Ponce, 422 U.S. 873 (1975)..... 20

United States v. Cagle, 849 F.2d 924 (5th Cir. 1988)..... 16

United States v. Irwin, 803 F.2d 1505 (9th Cir 1986)..... 16

United States v. Large, 729 F.2d 636 (8th Cir. 1984)..... 16

United States v. Place, 462 U.S. 696 (1983)..... passim

United States v. Puglisi, 723 F.2d 779 (11th Cir. 1984)..... 16

United States v. Sokolow, 109 S.Ct. 1581 (1989)..... passim

United States v. West, 733 F.2d 90 (1st Cir. 1984)..... 16

Ybarra v. Illinois, 444 U.S. 85 (1979)..... 18

Constitutional Provisions

Amend IV U.S. Const. ..... 2

Amend XIV U.S. Const. ..... 2

Statutory Provisions

28 U.S.C. § 1257..... 2

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

---

No. _____

MARGARET MARY LIMONJA and
RAYMOND JAMES BROOKS
Petitioners,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

---

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE COMMONWEALTH
OF VIRGINIA

---

**OPINIONS BELOW**

The published opinion of the en banc Virginia Court of Appeals of Virginia is found at 383 S.E. 2d 476 (1989), decided on the 15th day of August, 1989. (App. A). The decision of the Supreme Court of Virginia was entered on 17 January 1990 in Record No. 89-1132. (App. B).

## JURISDICTION

The final judgment of the Supreme Court of Virginia was entered on 17 January 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

## CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV to the United States Constitution reads as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment XIV, Section 1, to the United States Constitution reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, with out due process of law; nor deny any

person within its jurisdiction the equal protection of the laws."

## STATEMENT

This Court should hear this case because the Virginia Court of Appeals, with concurrence from the State Supreme Court, has ignored this Court's decision in United States v. Place, 462 U.S. 696 (1983) and is at odds with the various circuits regarding the meaning of the Place decision. Specifically, the Court below held that reasonable suspicion focused on a package not only permits the officers to detain the package while they seek to discern its contents but they may also seize and hold the travelers who are carrying the package. The police are not required, according to Virginia, to use the least intrusive means and leave the travelers free to go on their way. Furthermore, concededly inexperienced and untrained officers can conduct such a seizure when they do not even have enough information to fit a profile, let alone, a

specific, articulable focused suspicion.

The facts in this case are essentially not in dispute. A traffic patrol officer with little experience and no training in drug interdiction, or the like saw a Florida rental car heading north on Interstate 95 and decided to follow and stop it. He called for a backup and decided that he wanted a dog on the scene before he could find any pretext to stop the car. Although he wanted a dog, no call was made to get one.

During the officer's surveillance, his target went through an automatic toll booth without stopping and paying the ten cent toll. He and his backup followed it for about a half-mile and pulled the car over at a construction area on Interstate 95. The traffic officers approached the vehicle, obtained the driver's licenses of both occupants, the vehicle registration, and the car keys. The car had been rented for a round trip on the driver's credit

card in her name to her address. As with the driver, the occupant's driver's license matched his real name, address, etc.

Both occupants were asked to get out of the car. They consented to a search of the car. During this search, the traffic officers found another traffic violation, i.e., a disconnected radar detector on the floor of the passenger side. No drugs, guns, paraphernalia or the like were found in the car. The luggage was removed from the trunk. Each individual identified their various pieces of luggage and consented to it being searched. Again, no drugs, contraband, paraphernalia or the like was found. An officer seized a sealed, gift-wrapped package whose label was ambiguous.[1] According to the officer, Mr. Brooks

---

[1] The officer thought the package was addressed to "Ray" while Mr. Brooks contended the package was addressed to "Roy". In actuality, the label read "R y".

became nervous when the package was seized.

By 12:21 p.m., the vehicle, its contents and the suitcases had been searched and nothing had been found. The police held the keys to the car, its registration, the driver's license of both occupants, and the occupants under watch approximately 20 feet from the car on an enbankment.

Although the officers had no training in drug interdiction or the like, one claimed to have some limited experience assisting drug officers in a couple of drug profile stops. He testified that the little he did know about profiles was not met in this case. He claimed that the profile included two black males, but there were no two black males; there was a white male and a Hispanic female. In the profile, there was no luggage, but in this case each party had luggage. In this case the car

was not rented for cash in a false name for a one-way trip but was for a round trip in Ms. Limonja's own name, on her own credit card.

The sole focus of police attention was the package. At this point, 12:21 p.m., they made their first call to begin the search for a drug detection dog.[2]

There had been no effort to search Ms. Limonja and Mr. Brooks. The sole focus was on the package. There was no effort to issue the traffic citations for the violation which was the pretext for the stop and seizure. There was no adverse information regarding either individual, or the car. This marks the beginning of the unlawful seizure. The time was 12:21 p.m.

Ms. Limonja suffers from a bladder ailment and is required to take

---

[2] We know the times of these events because the traffic officer's radio communications to their headquarters were recorded on time indexed tapes.

prescription medication on a regular basis. During this seizure, it became time for her to take her medication but the officers initially would not let her take it. Eventually, they let her go to the car, under police escort, and take her medicine. Later, when she needed to relieve herself because of her bladder problem, the officers again initially refused her request. Eventually, they relented and allowed her to go to a restroom, again under police escort. The police kept the car keys, drivers' licenses and registration. The people were kept under guard 20-feet from the car on an enbankment. Both Ms. Limonja and Mr. Brooks testified that they did not feel free to leave.

There was a three-minute period during which Mr. Brooks consented to a search of the package; however, before it was opened, he withdrew consent. The length of the consent, i.e., three

minutes, is established by the taped radio communications.

The police had difficulty finding a dog. Despite this delay, they would not permit Ms. Limonja and Mr. Brooks to go on their way. A dog finally arrived on the scene about an hour after the stop, i.e., at 1:12 p.m. After the dog had performed its routine, the police told Mr. Brooks that they were going to get a search warrant to get in the package and that he and Ms. Limonja were going to be held for however long it took to get that warrant. By 1:28 p.m., the police had, to use their own word, "convinced" Mr. Brooks to give up his rights and permit them to search the package. The contraband found in the package formed the basis of the prosecution and subsequent conviction.

## OPINIONS OF THE COURTS BELOW

Ms. Limonja and Mr. Brooks sought to supress the evidence because the search and seizure violated their rights under the Fourth and Fourteenth Amendments to the United States Constitution, but the trial court denied their motion finding that the police had probable cause. A Petition for Appeal to the Court of Appeals of Virginia was filed and granted. That appeal raised the question, "Was the seizure and search to which the appellants were subjected violative of the rights guaranteed to them under the Fourth and Fourteenth Amendments to the Constitution of the United States?"

In a two to one decision, the Court of Appeals sustained the lower Court. While the Appeals Court considered this Court's decision in Place, supra, their focus was only on the length of detention. They gave absolutely no consideration to the express statements in Place, and,

indeed in other cases, that the police have to use the least intrusive means available. If focused on an item, they can only detain it briefly. This is permitted because the individual is still free to continue his travels. Id. at 706, 708.

The Appeals Court justified their claim of reasonable suspicion on a profile, Mr. Brooks nervousness, the mislabeled package, and the fact that Ms. Limonja tried to avoid a traffic ticket by claiming she did not have a dime for the toll while there was actually a dime in the closed unused ashtray of the car.

Your Petitioner's sought and obtained an en banc hearing arguing that under this Court's decision in Place, at most, the police could seize only the package and had to let the people go; regardless of the existence of or lack of reasonable suspicion, the detention was too long; and, there was no reasonable,

focused, articulable suspicion to justify the detention of either Mr. Brooks, Ms. Limonja, or the package. Petitioners also pointed out that the panel of the Virginia Court of Appeals had erroneously taken the profile characteristic of nervousness and tried to make it a separate characteristic, had misquoted the police witnesses regarding the profile characteristics by saying it required two persons when in actuality, the police had testified that two black males were required, and had mistaken the characteristic of no luggage since everybody agreed there was luggage in the car.[3] The en banc Virginia court reissued

---

[3] The Virginia Court of Appeals also misunderstood the police evidence on consent and found consent from 12:21 p.m. to 12:48 p.m., although there is absolutely no evidence of any type, to support that finding. Timed police taped recordings and testimony of all witnesses confirms that there was no consent from 12:21 p.m. to 12:45 p.m. and that the only consent was from 12:45 p.m. to 12:48 p.m., i.e., three minutes. Where the Court of Appeals got its computation of consent is unknown. This error is

the three judge panel opinion without comment.[4] The Supreme Court of Virginia ratified that opinion. At no time in the Virginia appellate process did the Courts address your Petitioners' persistent claim that under this Court's decision in Place, supra, at most, only the package could be held; the people had to be allowed to go on their way.

The Supreme Court of Virginia denied a petition for appeal on 17 January 1990.

**REASONS FOR GRANTING THIS WRIT.**

**I. When Police Claim Articulable Reasonable Suspicion Focused On A Closed, Sealed Package, Then They Must Use The**

---

similar to the error they made in their reliance on the profile factors which were not present.

[4] One member of the Court of Appeals during the en banc argument made a comment to the effect that the guarantees of the United States Constitution can be suspended in order to facilitate the prosecution of people accused of drug crimes, i.e., the ends justify the means.

**Least Intrusive Means Available Which Permits Them To Hold The Package Briefly But Does Not Permit Them To Also Hold The Travelers.**

While it is clear that the police can seize things in certain limited circumstances without the benefit of a warrant, it is equally clear that under such circumstances they must use the least instrusive means possible. The scope of their authority is carefully circumscribed. This Court gave voice to this proposition in Place, supra, when it said:

> "...we conclude that when an officers' observations lead him reasonably to believe that a traveler is carrying luggage [package] that contains narcotics, the principles of Terry and its progeny would permit the officer to detain the luggage [package] briefly ... the person whose luggage [package] is detained is technically still free to continue his travels or carry out other personal activities ..." Id. at 706, 708 (emphasis added) ("[package]" added).

In the case sub judice, the lower courts completely ignored this Court's clear and unequivocal language. Indeed, the Appellant Courts below did not address the fact that, at most, the police could only keep the package and had to let the people go. No one has ever claimed that the police focus was on anything other than the package.

The lower Court in the case sub judice is in conflict with this Court and all the Circuit Courts of Appeal on this issue. Their decision is in conflict with the Fourth Amendment as applied to the states through the Fourteenth Amendment. The principal of Place as practiced in Sokolow and other appellate cases was not followed in this case.

In United States v. Sokolow, ___ U.S. ___, 109 S.Ct. 1581 (1989), for example, the agents let Mr. Sokolow go home after they had seized his luggage and a dog had alerted on it because they could

not get a warrant to search it that night. Id. at 1584. This is in keeping with the practice in all of the circuit court opinions we have been able to find. United States v. Borys, 766 F.2d 304 (7th Cir.), cert. denied 474 U.S. 1082 (1985) (focus on property, only property kept, person allowed to leave, person advised of right to refuse consent to search); United States v. Alpert, 816 F.2d 958 (4th Cir. 1987) (focus on luggage, luggage kept, individual allowed to leave); United States v. Large, 729 F.2d 636 (8th Cir. 1984) (focus on article of property, only it detained, people allowed to leave); United States v. Cagle, 849 F.2d 924 (5th Cir. 1988) (focus on suitcase, suitcase held, individual allowed to leave); United States v. Irwin, 803 F.2d 1505 (9th Cir. 1986) (focus on an individual's backpack, it detained, individual allowed to drive away); United States v. West, 733 F.2d 90 (1st Cir. 1984) (focus on luggage, luggage

detained, individual allowed to leave); and United States v. Puglisi, 723 F.2d 779 (11th Cir. 1984) (focus on suitcase, suitcase kept, individual allowed to leave). In all of these cases, this Court's decision in Place was obeyed. The rights of the individual were protected and the least intrusive means available was used. That did not occur in the case sub judice.

Our Country has a long history of respecting the rights of the individual, keeping reasonable curbs on the actions of police, and following the law even when we are not pleased with the practical consequences. As Justice Brendeis said in his dissent in Olmstead v. United States, 277 U.S. 438, 479 (1928) cited by Mr. Justice Scalia in his dissent in National Treasury Employee's Union v. Von Rabb, ___ U.S. ___, 109 S.Ct. 1384 (1989):

> "[I]t is ... immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most

> on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasions of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding." Id. at 1402.

It is for this reason that this Court in Ybarra v. Illinois 444 U.S. 85 (1979) held that police with a search warrant for a bar and its owner could not also hold and search the patrons. They were limited in the scope of their authority. The patrons were protected by the Fourth Amendment since the focus was on the bar and its owner. Similarly in Arizona v. Hicks, 480 U.S. 321 (1987) this Court limited the exercise of police authority to that which was the legitimate focus of their attention. They had a right to be in the premises but that did not give them the right to go nosing around copying serial numbers of stero equipment. They were

limited to that which was their proper focus.

In Place, supra, the same principle was reiterated when this Court concluded that when an officer has reason to believe that a traveler is carrying an item which contains narcotics then under the principle of Terry v. Ohio, 392 U.S. 1 (1968) and its progeny the officer can detain the item briefly. Id. at 706. The person is free to travel or carry out whatever other personal activities they wish. Id. at 708. This Court was careful to limit the scope of police authority to that which was the focus of their attention.

This Court ought to hear this case so that this split in authority by Virginia is resolved and any ambiguity or lack of clarity as to this Court's decision in Place is resolved. Resolution of this apparent conflict would be of

practical aid to law enforcement and the courts.[5]

**II. A Traffic Patrolman With No Training And Little Experience In Drug Cases May Not Seize And Hold Travelers And Their Package Because One Traveler Is Nervous And The Package Is Ambigiously Labeled.**

In Sokolow, supra, this Court permitted experienced, trained narcotics officers to rely on factors that also constituted parts of a profile in forming a reasonable suspicion focused on a travelers luggage. This is consistent with the decision in Terry v. Ohio, 392 U.S. 1 (1968) in which the officer was allwed to draw inferences from the facts

---

[5] It should be noted that in the appellate cases cited by the Petitioner here, as a practical matter, the officers had even less information about the individuals than did the officers in this case. They did not, in those cases, have the drivers license, home address, etc.; yet, there was no practical impediment to effective law enforcement by following the practice of keeping the luggage and letting the people go.

"in light of his experience." Id. at 27. In Terry, the officer had 39 years experience. See also United States v. Brignoni-Ponce, 422 U.S. 873, 884-85 (1975) (experienced, trained officer given deference because of experience and training).

The officers in this case had no training in drug interdiction, profiles, or the like. They likewise had almsot no experience in these areas of law enforcement. They were traffic patrolman looking to make a big case. Even the little they knew about profiles was not present in this case.

According to the officers a profile includes two black males but that was not present. The only male was white and the only dark person was a female. The profile included the absence of luggage but each individual had luggage. All that the officers really had were factors relating to a host of innocent travelers.

They had a Florida car rented for a round trip on the driver's credit card in her own name. There was no cash, no false names and no one way ticket. When they were stopped, Ms. Limonja sought to avoid a ticket by saying, "Gee, I didn't pay the toll because I didn't have a dime." The discovery of a dime in a closed ashtray in a rental car is not an indicia of criminal activity. Likewise, the discovery of a radar detector, which is a traffic violation, is not an indicia of drug activity. The police profile did not include radar detectors or people saying they did not have a dime when in fact they did.

Mr. Brooks was nervous but nervousness alone, after all of the other profile factors have been shown not to exist and after a search of the car and the luggage has failed to reveal anything, is not sufficient to hold someone.

Unless Sokolow overruled Reid v. Georgia, 448 U.S. 438 (1980) and Florida v. Royer 460 U.S. 491 (1983), there was no reasonable suspicion here. In Reid, a mere profile would not suffice. In Royer, Mr. Royer fit a profile and became nervous when he was being detained by police but that was not sufficient to establish reasonable suspicion. Mr. Royer had another factor similar to this case , i.e., the mislabeling of an item he was carrying. His suitcase had the name "Holt" whereas in the case sub judice, the package had "R Y". In Royer, that was insufficient, even when coupled with a profile and nervousness, to create reasonable suspicion. The same should apply here where there was not even a profile. The officers in Royer and Reid were drug officers; here they were not.

A look at Sokolow is also useful. Mr. Sokolow had a four thousand dollar roll of twenty dollar bills from which he

paid $2,100.00 for two round trip tickets from Hawaii to Miami. He traveled under a name that did not match the telephone number he left and although coming from the vacation wonderland of Hawaii he traveled to Miami to stay there only 48 hours on a flight which lasted 20 hours. He was nervous the whole time. Contrast this to Mr. Brooks who became nervous only when the package was seized and it looked like they were going to be held there for a while. Furthermore, Sokolow wore a lot of gold jewelry and had not changed his clothes for this 20 hour, turnaround flight. The police in Sokolow were also trained narcotics agents with experience in drug enforcement. That was clearly absent in the case sub judice. We are not dealing here with the trained eye of experienced drug enforcement officers.

This case could also be contrasted with the officer in Terry, supra, who had approximately thirty years on the same

beat. He knew when something was amiss because he had been there for thirty years. A narcotics officer would not have been able to read the same information the same way as did the officer in Terry. Similarly these traffic officers could not read this information through the eyes of trained narcotics agents.

This Court should grant this Petition and clarify the limits of Sokolow including clarification of the the deference given to trained, experienced officers as compared to those who are not.

## CONCLUSION

"(Fourth Amendment rights)... are not mere second-class rights but belong to the catalog of indispensable freedoms. Among depravations of rights none is so affective in cowing a population, crushing the spirit of individuals and putting terror in every heart. Uncontrolled search and seizure is one of the first and

most affective weapons in the arsenal of every arbitrary government..." .

"... but the right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside the courts." Brinegar v. United States, 338 U.S. 160, 180-181 (1949) (Jackson, J., dissenting). Cited in Illinois v. Gates 462 US 213,274.5 (1983) (Brennan, J., dissenting).

In Place there was no dissent to the proposition that the police may only detain the luggage that is the focus of their attention and that the individual is free to leave. One state supreme court has decided to depart from that holding creating a split in appellant decisions applying Place. This Petition ought to be granted so that the holding in Place can be clarified for those who misapprehend its teachings.

This Court should also grant this Petition and hear this case to clarify the effect of Sokolow, on Royer and Reid.

For the reasons set forth, this Petition should be granted, the case heard, and the Petitioners granted relief.

Respectfully submitted,

MARVIN D. MILLER
1007 King Street
Alexandria, VA 22313
(703) 548-5000

THOMAS L. BARNEY
10 N. Meadow Street
Richmond, Virginia
(804) 355-1476

Counsel for Petitioners

# APPENDIX

**APPENDIX A**

**COURT OF APPEALS OF VIRGINIA**

Present: Chief Judge Koontz, Judges Barrow, Benton, Cole, Coleman, Duff, Hodges, Keenan and Moon
Argued at Richmond, Virginia

MARGARET MARY LIMONJA
and
RAYMOND JAMES BROOKS

v. Record No. 1230-86-2

OPINION BY
JUDGE MARVIN F. COLE
August 15, 1989

COMMONWEALTH
OF VIRGINIA

UPON REHEARING EN BANC

Marvin D. Miller (Thomas L. Barney, on brief), for appellants.

Eugene Murphy, Assistant Attorney General (Mary Sue Terry, Attorney General, on brief), for appellee.

The appellants, Margaret Mary Limonja and Raymond James Brooks, were convicted in a bench trial of possession of cocaine with intent to distribute. On appeal they contend that the seizure of their persons, the search of their car, and their extended detention violated

rights guaranteed to them under the fourth and fourteenth amendments to the United States Constitution. A decision of a panel of this court affirmed the judgment of the trial court. Limonja v. Commonwealth, 7 Va. App. 416, 375 (S.E.2d 12 (1988). On petition the appellants were granted a rehearing en banc.

I.

We review the evidence in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom. The judgment of a trial court sitting without a jury is entitled to the same weight as a jury verdict and will not be set aside unless it appears from the evidence that the judgment is plainly wrong or without evidence to support it. Martin v. Commonwealth, 4 Va. App. 438, 443, 358

S.E.2d 415, 418 (1987) (citing Code § 8.01-680).

On November 17, 1985, Trooper Thomas C. Keith of the Virginia State Police was patrolling Interstate 95 in an unmarked vehicle near the Walthall exit. He observed the defendants traveling north in a car with a Florida license plate indicating that the vehicle was a rental car from Dade County. His suspicions aroused, Trooper Keith attempted to run a license check, but all of the computers in Florida were down. At this time, Keith radioed for a narcotics dog and a backup.

Soon thereafter, the defendants drove through a stop sign at an automatic toll booth without paying the toll. Officer Keith pulled them over at 12:20 p.m. Officer Dempsey joined Keith as a backup. Keith asked for and received the defendants' drivers' licenses and the rental agreement in place of a

registration card. These checked satisfactorily. He explained to the driver, Limonja, that he had stopped her because she had run the automatic toll booth without stopping or paying. When asked why she had done so, she replied that she did not have a dime, the required exact change. From his vantage point outside of the car, Keith noticed, according to his testimony, "a part of the radar detector on the other side of the vehicle in the passenger seat." On cross-examinatin, Keith stated that he "could see a portion of it" but did not know "exactly" what it was.

Having determined tht the vehicle had been rented in Florida and that a radar detector was partially in view on the passenger's side of the vehicle, Keith asked permission to search the vehicle, suspecting the two individuals of drug trafficking. When the defendants

consented to a search, Keith had both Limonja and Brooks exit the vehicle and move to the rear where they would be "away from traffic." Officer Dempsey stated that he was "positioned at the side of the occupants looking to see that they did not get hit." Keith proceeded to search the passenger compartment and trunk.

During the course of the search, Keith took possession of the radar detector beind the right front passenger seat. He also found a dime and four nickels in the ashtray located on the dash. In the the trunk, Keith found suitcases and a gift wrapped package. Keith asked Brooks and Limonja which piece of luggage belonged to them. They each identified their luggage. The suitcases were searched but nothing unusual was found. Keith then asked to whom the gift wrapped package belonged. Defendant Brooks stated that it belonged to neither of them and that he was

delivering it for a friend. Keith thought the package was addressed to "Ray," Brooks' first name, but Brooks said that it was addressed to "Roy." Although he said that he did not know what was inside of it, Brooks stated that he had written and placed the label on the package. According to the testimony of Keith, although it was not a hot day, brooks "broke out in a heavy sweat under both arms while we were talking about the package" and "once I took the package and had it set on the front of my car, ... Mr. Brooks had his mind strictly on that package." Brooks eventually signed a written consent to open the package.

Shortly after the vehicle was stopped, Officer Keith again requested the State Police communication center to obtain a narcotics dog. When the dispatcher discovered their own narcotics dog was not available, he contacted the

Chesterfield County police, the Petersburg police and other area jurisdictions in an effort to obtain a narcotics dog. While waiting for the narcotics dog to arrive, Brooks withdrew his consent to search the package at 12:48 p.m., saying that he wanted to wait and see what the narcotics dog did.

At 1:10, a narcotics dog from Chesterfield County arrived on the scene. Approximately fifty minutes had elapsed. The dog, an experienced drug detection canine, alerted on the package. Keith then explained to Brooks what had occurred. Brooks asked Keith: "What happens if I don't let you open the package?" In response to the question, Keith then "explained to him that (he) would have to get a search warrant to open it since the dog had hit on it." Brooks then consented, stating that the package

was not his and he did not know what was in it.

Keith had difficulty opening the package which was covered with electrical tape. Brooks provided a nail file to assist him. As the package was being opened, Brooks inquired, "What if it's a radar detector?" The package consisted of gift wrapping of a cardboard box bearing the markings of Micronta Road Patrol XK radar detector device which was the same make and model number of the radar detection violation. When Keith opened the package, he found a white powder substance, subsequently determined to be approximately 1000 grams of cocaine of 82.2% purity. Both defendants were then arrested. The time of the arrests was 1:20 p.m. Another search of Brooks' suitcase disclosed an additional 300 grams of cocaine of 78.4% purity.

After opening the package, additional time was taken at the scene to search the baggage of the parties and to make provisions for the security of their vehicle. Officer Keith left the scene at approximately 3:30 p.m. to go the magistrate's office. Finding the magistrate extremely busy, Keith had to wait. The arrest warrant on the drug charge and the traffic citations (which had been written at the scene but not issued to the defendants) were finally processed and executed upon the defendants between 4:00 p.m. and 6:00 p.m.

Prior to trial, Limonja and Brooks moved to suppress all evidence obtained incident to the stop, contending the stop was illegal because it was not based upon probable cause or reasonable and articulable suspicion. Over their objection, the motion to suppress was denied.

## II.

Although Limonja and Brooks admit that the police could lawfully have stopped them for running the automatic toll booth stop sign, they claim the stop was pretextual because it was for the purpose of conducting an illegal investigation of suspected criminal activity. As proof that the stop was pretextual, they point to the fact that the stop occurred at 12:20 p.m., that the traffic summons was not issued until 4:30 p.m., and that, during the interim period, the police focused their attention upon the contraband investigation. They maintain that, as a consequence of this unlawful conduct, all of the subsequent acts are tainted by the initial alleged illegality. The Commonwealth asserts that the police were justified in stopping the defendant's vehicle for its failure to stop at the stop sign in violation of Code

§ 46.1-173[1] and failure to pay the required toll in violation of Code § 33.1-345(8).[2] Further, it maintains that

---

[1] Code § 46.1-173 states, in pertinent part:

> A. The State Highway and Transportation Board may classify, designate and mark state highways and provide a uniform system of marking and signing such highways under the jurisdiction of this Commonwealth .... The driver of a vehicle shall obey and comply with the requirements of road signs erected upon the authority of the State Highway and Transportation Board.
>
> * * *
>
> C. The failure of such driver to obey such signs, signals, markings or lights or to comply with the provisions of this section shall consitute a traffic infraction.

[2] Code § 33.1-345(8) provides that failure or refusal to pay a toll constitutes a Class 1 misdemeanor. For reasons unknown, Officer Keith did not arrest defendant Limonja on this offense. Had he done so, a warrantless search of the car's passenger compartment and any containers therein would be been justified as incident to an arrest. See New york v. Belton, 453 U.S. 454 (1981).

Effective July 1, 1988, failure or refusal to pay a toll is a traffic infraction in violation of Code § 46.1-229.4.

unless the defendants can demonstrate that the police do not ordinarily stop people who run through stop signs and toll booths, no pretext can be claimed.

The objective sufficiency of the reasons for the stop is the test for determining whether the stop is pretextual. Police actions are to be tested "under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved." Scott v. United States, 436 U.S. 128, 138 (1978) (footnote omitted).

> [T]he validity of an arrest is normally juaged by an objective standard rather than by inquiry into the officer's presumed motives. If this were not so, an arrest's validity could not be settled until long after the event; it would depend not only on the psychology of the arresting officer but the psychology of the judge.

United States v. McCambridge, 551 F.2d 865, 870 (1st Cir. 1977). "Whether a Fourth Amendment violation has occurred

'turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time,' and not on the officer's actual state of mind at the time the challenged action was taken. Maryland v. Macon, 472 U.S. 463, 470-71 (1985) (quoting Scott, 436 U.S. at 136, 138-39 n.13). "[I]n determining whether an investigative stop is invalid as pretextual, the proper inquiry is whether a reasonable officer would have made the seizure in the absence of illegitimate motivation." United States v. Smith, 799 F.2d 704, 708 (11th Cir. 1986) (emphasis in original).

In Horne v. Commonwealth, 230 Va. 512, 339 S.E.2d 186 (1986), the defendant was a suspect in a rape and murder investigation. When the police learned of two outstanding misdemeanor warrants against him, they arrested him on those charges but interrogated him concerning

the rape and murder investigation. The defendant confessed. On appeal, the defendant argued that the misdemeanor arrests were pretestual and therefore all evidence derived therefrom should have been suppressed. Id. at 514-15, 339 S.E.2d at 188. The Virginia Supreme Court disagreed:

> [E]ven though the officers were acting on the basis of warrants, [the defendant] would have us analyze the motive of the police. We think such an approach would be unworkable. It would require a judge in every squad car. In every case of an arrest pursuant to a warrant, the court would have to look over the shoulder of the police, and ask, "Why is he really arresting this person?" We reject this subjective approach in a case such as this where the officers were executing warrants.

Id. at 517, 339 S.E.2d at 189-90. "[I]f the arrest is bona fide," held the Court, "the police can make preplanned coordinated use of the arrest to give them the opportunity to ask questions about matters for which probable cause to arrest

does not exist." Id. at 517, 339 S.E.2d at 190.

The same reasoning applies when a traffic infraction rather than an arrest is the basis for the stop. It is inappropriate in either case to attempt to determine the true motive of the officer. Rather, the appropriate test is whether a reasonable officer would have made the seizure.

In the present case, the police had the authority to stop the motor vehicle for failing to stop at a stopsign in violation of Code [section] 46.1-173 (c) and for failing to pay the required toll in violation of Code [section] 33.1-345(8). We believe that any reasonable police officer who observed such conduct would have seized that individual and issued him a citation or an arrest warrant. See McCambridge, 551 F.2d at 870 (stopping defendant for "following too

closely" was not pretextual where sheriff had just stopped another driver for same offense); cf. Smith, 799 F.2d at 709 (stopping defendant for failure to change lane safely and reckless driving was pretextual where driver only deviated six inches from road and weaved slightly within a single lane of an interstate highway). Therefore, we find that the initial stop was not pretextual.

III.

The Commonwealth further justifies the extended detention on the basis of consent. The defendants contend that the consent they gave was obtained by coercion and deception, and that the Commonwealth did not meet its burden of proving the consent was freely and voluntarily given. They claim that they were never apprised of their right to leave the scene or to refuse the search.

Where consent is freely and voluntarily given, probable cause and a search warrant are not required. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). The defendants are correct in asserting that the burden is on the Commonwealth to prove the voluntariness of the consent. Lowe v. Commonwealth, 218 Va. 670, 678, 239 S.E. 2d 112, 117 (1977), cert. denied, 435 U.S. 930 (1978). Whether the consent was freely given is a question of fact to be determined from the totality of all the circumstances. Id. The voluntariness of the consent is a question of fact to be determined by the trial court and must be accepted on appeal unless clearly erroneous. Stamper v. Commonwealth, 220 Va. 260, 268, 257 S.E.2d 808, 814 (1979), cert. denied, 445 U.S. 972 (1980).

In Schneckloth, the Supreme Court

established the standard to determine voluntariness of a consent:

> [W]hen the subject of a search is not in custody and the state attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosectuion is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.

412 U.S. at 248-49.

The evidence in this case adequately establishes that Limonja and Brooks voluntarily and intelligently consented to a search of the vehicle. Officer Keith approached the defendants' vehicle and explained to them that he had stopped them because the operator had run the automatic toll booth. At that point, Keith asked for permission to search the vehicle. Both defendants gave oral consent, first Limonja and then Brooks.

Keith had them exit the car and stand to the rear in order to be away from traffic. The search was not made upon any claim of authority by the police; there was no show of force by the police; there were no threats; the defendants have claimed no mental or emotional infirmity nor does the record disclose any; and there has been no deception as to identity or prupose on behalf of the police. Furthermore, Officer Keith's failure to inform the defendants of their fourth amendment protections or their right to refuse consent does not render the consent involuntary. United States v. Watson, 423 U.S. 411, 425 (1976).

Although the defendants claim coercion and deception, they have not pointed to any specific facts in the record to support these conclusions. There is no evidence of coercion or deception on the part of the police.

Because a valid consent to search obviates the need for probable cause or a warrant, it was not necessary for the Commonwealth to prove probable cause to search.

IV.

The defendants contend that even if the traffic stop was valid, the traffic citation should have been issued and they should have been permitted to go on their way. They argue that when the police detained them over an extended period of time without probable cause and searched their car and its contents, they exceeded the scope of their authority and the purpose of the stop, requiring suppression of the evidence seized as a result of the search.

The Commonwealth does not claim probable cause for the search, but justifies the continued detention upon the standards announced in Terry v. Ohio, 392 U.S. 1 (1968). The Commonwealth claims

that the police possessed reasonable suspicion based upon articulable facts to justify the detention beyond the time necessary to issue the traffic summons. Further, the Commonwealth maintains that the extended detention was justified because the defendants voluntarily consented to it.

As stated in part III of this opinion, we find that the oral consent to search the car was freely and voluntarily given. Written consent was then given to search the gift-wrapped package but was withdrawn at 12:48 p.m. Because the detention was consensual until that point, only the delay thereafter must be considered in determining whether the length of the detention was unreasonable. Approximately twenty-two minutes elapsed between withdrawal of Brooks' consent and when the narcotics dog alerted on the package.

At the time consent to search the gift-wrapped package was withdrawn, the police knew that the defendants were driving a Florida rental vehicle from Miami, traveling north on I-95, a known route of drug traffickers from Florida to the northeast. They knew that the defendants were in possession of a radar detector in violation of Code [section] 46.1-198.1. Defendant Limonja lied about her reason for running the tollbooth; she did, in fact have the required exact change. Defendant Brooks became very nervous and sweated heavily when the gift-wrapped package was discovered. The wrapped package had what appeared to be the first name of Brooks on it, but Brooks, while acknowledging that he had addressed the label on the package, denied that it was his name, denied knowing what the package contained and explained only that he was delivering it

for a friend. This confused and inconsistent explanation was sufficient to make the officers suspicious of the contents of the package. We find that this combination of articulable facts gave the officers reasonable suspicion to justify the detention after the consensual stop ended.

The defendants contend that the police exceeded the bounds of an investigatory stop by detaining them for over sixty minutes. Thus, argue the defendants, probable cause to arrest was required and since it did not exist, any evidence seized must be suppressed. However, as just stated, only twenty-two minutes of the detention were without consent, not sixty, as the defendants contend.

"(T)here is (no) litmus paper test for ... determining when a seizure exceeds the bounds of an investigative stop." Royer

v. Florida, 460 U.S. 491, 506 (1983). The Supreme Court has refused to adopt a "hard-and-fast time limit for a permissible Terry stop." United States v. Sharpe, 470 U.S. 675, 686 (1985); United States v. Place, 462 U.S. 696, 709 N.10 (1983). "Much as a 'bright line' rule would be desirable, in evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria." Sharpe, 470 U.S. at 685.

> In assessing whether a detention is too long in duration to be considered an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.

Id. at 686

Using the foregoing test, courts have upheld detentions of forty-five minutes, United States v. Davies, 768 F.2d 893, 901 (7th Cir.), cert. denied, 474 U.S. 1008

(1985); fifty minutes, United States v. Alpert, 816 F.2d 958, 964 (4th Cir. 1987); sixty minutes, United States v. Large, 729 F.2d 636, 639 (8th Cir. 1984); United States v. Campbell, 627 F. Supp. 320, 325-26 (D. Alaska 1985), aff'd 810 F.2d 206 (9th Cir. 1987); and seventy-five minutes, United States v. Borys, 766 F.2d 304, 313 (7th Cir.), cert. denied, 474 U.S. 1082 (1985). Each of the last four cited cases involved delays necessitated by efforts to obtain a narcotics dog for sniffing luggage or packages, as in this case.

The defendants' reliance upon United States v. Place, 462 U.S. 696 (1983), is misplaced. In Place, the Court found that the police had not "diligently pursue(d) their investigation" because they "knew the time of Place's scheduled arrival at LaGuardia, had ample time to arrange for their additional investigation at that location, and thereby could have minimized

the intrusion on (Place's) Fourth Amendment interests." Id. at 709. In our case, however, as in United States v. Quinn, 815 F.2d 153, 158 (1st Cir. 1987), there was "no way that the agents could have greatly shortened their inquiry if they were to 'confirm or dispel their suspicions' meaningfully." Unlike Place, the police, in this case, had not been investigating the defendants, had not anticipated the encounter, and could not have dispelled their suspicions more quickly.

Even in airport cases, the courts have recognized that there is no requirement that narcotics dogs be maintained at the airport so as to be "immediately available." Borys, 766 F.2d at 314; see Alpert, 816 F.2d at 964. It is just as clear that there will be inevitable delay in obtaining a dog to sniff luggage or packages transported on interstate highways. If, as in this case, the officers make a diligent effort to obtain a dog,

continued detention during the delay does not violate the constitution. Therefore, applying Place and Sharpe, we find that the detention did not exceed the permissible bounds of an investigatory stop.

V.

Finally, the defendants contend that Brooks' consent to open the package was not freely and voluntarily given but rather was the result of coercion and deception. This contention is without merit. When the narcotics dog alerted on the package, probable cause to search existed. United States v. Race, 529 F.2d 12 (1st Cir. 1976). Officer Keith told Brooks that if he did not consent, Keith could get a search warrant. Keith did not misrepresent the situation to Brooks, and no evidence exists that any of the other factors negating voluntary consent, as discussed in part III of this opinion, were present. Therefore, we find that the

consent to search the gift wrapped package was voluntary and the evidence obtained pursuant to the search was properly admitted into evidence.

For the reasons stated, we affirm the judgment of the trial court.

Affirmed.

BENTON, J., dissenting.

I respectfully dissent. In affirming this conviction the majority sanctions a warrantless seizure, based on less than probable cause, of a package removed from an automobile trunk during a traffic stop. The majority further holds that because the occupants of the automobile fit a drug courier profile, they could be detained for a substantial period of time while law enforcement officers sought to locate a dog for the purpose of sniffing the package for narcotics. Because the conduct of the law enforcement officers in detaining the occupants was unreasonable and unnecessarily intrusive, I would hold that a fourth amendment violation occurred and I would suppress the fruits of the unlawful seizure and detention.

A full account of the facts is necessary to disclose the purposefulness of the officer's conduct and to

demonstrate the illegality of the extraordinary detention of the package and the occupants of the automobile. The facts show that State Trooper Thomas Keith was patrolling in an unmarked vehicle when he saw a Florida rental automobile travelling north on Interstate 95. Keith determined that the automobile and its two occupants, Margaret Mary Limonja, the driver, and Raymond James Brooks, fit a drug courier profile. Although the evidence does not indicate that the automobile was exceeding the speed limit, Trooper Keith began "pacing" the automobile because he was "trying to ... get the speeding ticket." He also called his dispatcher for a check of the license plate number; however, the record system computer was not working. Before he "got a pace on them," the automobile left the interstate highway. Solely because he believed that the automobile fit a drug

courier profile, Keith followed the automobile. He parked his vehicle and observed the automobile as it went to one gas station that was closed and then proceeded to another that was open for business. Keith waited and watched while Limonja went to the restroom and Brooks got gas and checked the oil.

Keith contacted State Trooper Dempsey while he was watching the automobile that fit a drug profile and that he "was going to wait to see if (he) could get a pace on them." Dempsey, who was driving a marked state police vehicle, indicated to him that he was coming to that location.

Keith followed the automobile when it left the gas station. He testified that "(s)ometime in between the time that the car left the Exxon station" and before it reached the toll gate to enter the highway he decided to call for a

narcotic's detection dog. He told Dempsey that he wanted a dog and "(a)s far as (he knew the request for a dog) was make by Trooper Dempsey" before Limonja drove back onto the interstate highway.

Because the automobile "didn't stop when (it) went through (an unmanned, automatic toll) booth," Keith activated his grill lights and stopped the automobile as it re-entered the interstate highway. Dempsey testified that he was already at the southbound side of the same exit when he received Keith's call. Dempsey testified: "I was stationary looking directly over to the northbound lane when I saw the vehicle go right through the toll booth plaza, the stop sign. It did not stop for the stop sign at all."

Keith stopped Limonja at 12:10 p.m., informed her "that she had run the automatic toll booth," and asked "was

there any particular reason why she did this." She told him that she only had four quarters and the toll booth required exact change of ten cents. He then asked for her driver's license and automobile rental agreement. From his position outside the automobile Keith saw no luggage in the passenger compartment and saw an object under Brooks' seat that he was unable to identify[1]. After he

---

[1]At the conclusion of the Commonwealth's recross-examination of Officer Keith, the trial judge questioned Keith concerning the items that he was able to see from outside the car and before the search:

> The Court: ... Did you see any money from the outside of the car on the floor in the car?
>
> The Witness (Officer Keith): No, sir.
>
> The Court: You did not. Did you see the radar detector?
>
> The Witness: I could see a portion of it.
>
> The Court: Did you know what it was?

received the license and rental agreement, Keith asked to search the automobile. He testified that Limonja and Brooks permitted the search. They were told to leave the automobile and were guarded by Dempsey as they stood on the shoulder of the highway[2]. During the search of the automobile, Keith first found a radar

---

The Witness: Not exactly. No sir.

[2] Officer Dempsey testified:

> (1) "I was posted at the side of the road with (Brooks and Limonja);"
>
> (2) "They (Brooks and Limonja) were up on the grass when I was watching them; and
>
> (3) "I was ... watching out for the safety of the Trooper (Keith)"

More specifically, Dempsey testified that he was posted "on the grass portion of the highway, actually off of the highway, watching the vehicle and watching the traffic, and watching (Brooks and Limonja)." Dempsey said that his "main concern was the people (Brooks and Limonja) on the side of the road ... (t)en or twenty feet on the hill."

detector "partially stuck in behind underneath the right front seat where Mr. Brooks was sitting." Keith testified that both the toll booth offense and the possession of a radar detection offense are traffic offenses that are handled through the issuance of citations.

When Keith began his search of the trunk, Brooks and Limonja were required to identify their luggage. Keith searched the luggage but found no contraband. A gift wrapped package was removed from the trunk and placed on the hood of Keith's idling automobile. When the package was discovered, Dempsey again called concerning the dog. Brooks told Keith that he was delivering the package for a friend and he was asked by Keith to sign a written consent to search the package. Brooks signed the document at 12:45 p.m. but then revoked the consent at 12:48 p.m. When Brooks revoked his consent, he

and Limonja were not permitted to leave and were required to wait on the side of the highway while the officers continued their efforts to locate a narcotics detection dog and have it brought to the scene. While they waited, Keith questioned Limonja and Brooks concerning their destination and the package. The gift wrapped package remained on the hood of the idling police vehicle while Dempsey was on his radio attempting to locate a dog.

When a dog arrived at 1:13 p.m., the package was removed from the hood of Keith's automobile and placed on the front seat of the rental automobile. Limonja needed to use a toilet and, after the dog arrived, was taken by Trooper Worrell at 1:19 p.m. to a toilet in a nearby restaurant. At 1:23 p.m. Keith requested assistance for preparation of a search warrant for the package. Worrell returned

with Limonja to the scene at 1:32 p.m. After Trooper Worrell returned to the scene, he saw the dog go around the automobile and then into the automobile. The state police dispatcher's log reflects that Worrell advised the dispatcher at 1:36 that dog had "a positive hit." Keith told Brooks that if he did not consent to a search of the package, a search warrant would be secured. Brooks then permitted the search which led to the discovery of cocaine. Limonja and Brooks were arrested and later taken to the magistrate's office. The traffic citations were given to Limonja at the magistrate's office at 4:30 p.m.

"The Fourth Amendment is ... a guarantee against ... unreasonable searches and seizures." United States v. Sharpe, 470 U.S. 675, 682 (1985). In Terry v. Ohio, 392 U.S. 1 (1968), the Supreme Court recognized a "narrowly drawn" exception to

the fourth amendment requirement of probable cause, and held that a police officer may conduct an investigative stop where he is able to "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Id. at 21.

> "The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered it initiation permissible." The reasonableness requirement of the Fourth Amendment requires no less when the police action is a seizure permitted on less than probable cause because of legitimate law enforcement interests. The scope of the detention must be carefully tailored to its underlying justification.
>
> The predicate permitting seizures on suspicion short of probable cause is that law enforcement interests warrant a limited intrusion on the personal security of the suspect. The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop.

> Similarly, the investigative methods employed should be the least intrusive means reasonable available to verify or dispel the officer's suspicion in a short period of time. It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.

Florida v. Royer, 460 U.S. 491, 500 (1983) (citations omitted) (emphasis added). A detention for investigative purposes subsequent to a valid traffic stop and unrelated to the justification for that initial stop may be so extended as to be unreasonable and violative of the fourth amendment. See United States v. Recaldle, 761 F.2d 1448, 1455 (10th Cir. 1985).

In the present case the Commonwealth failed to demonstrate that the seizure of Limonja, Brooks, their vehicle, and their belongings were "justifi(ed) on the basis of a reasonable suspicion ... sufficiently limited in scope and duration to satisfy the

conditions of (the) investigative seizure." Royer, 460 U.S. at 500. Although Keith's testimony provides a sufficient basis upon which to conclude that Keith stopped the automobile because of the drug courier profile, he testified that he stopped the automobile, in fact, because Limonja had failed to pay a toll at the booth and had run the toll's stop sign. "(A) brief delay while (a law enforcement officer) issued a traffic citation was inevitable, proper, minimally intrusive." Recalde, 761 F.2d at 1455.

Although the documents were in order, Keith did not then issue a citation for the traffic violation. Instead, while retaining their identification, he asked Limonja why whe had run the toll gate. Because Keith intended to pursue his suspicions that they were drug couriers, he sought and obtained from Limonja and Brooks consent to search the interior of the automobile and trunk. Thereafter, Keith obtained a written consent

from Brooks to open the wrapped package found within the trunk; however, Brooks validly revoked the consent before the officer opened the package. See Mason v. Pulliam, 557 F.2d 426 (5th Cir. 1977) (consent may be revoked); United States v. Homburg, 546 F.2d 1350 (9th Cir. 1976), cert. denied, 431 U.S. 940 (1977) (same). Assuming the validity of the intrusion that occurred prior to the withdrawal of consent, it is at this point that the scope and subsequent duration of the ensuing detention and search were clearly no longer "'strictly tied to and justified by' the circumstances which rendered (their) initiation permissible." Terry, 392 U.S. at 19 (quoting Warden v. Hayden, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)).

Our Court recently held in Taylor v. Commonwealth, 6 Va. App. 384, 369 S.E.2d 423 (1988) (en banc), that reasonable, articulable suspicion that illegal narcotics are being transported cannot rest solely on

the fact that a traveller matches a drug courier profile. See also Reid v. Georgia, 448 U.S. 438, 441 (1980). Seizures premised solely on a belief that individuals match a drug courier profile are violative of the fourth amendment. Id. Since the drug courier profile did not provide a reasonable, articulable suspicion that Brooks and Limonja were transporting drugs, the continuing seizure and detention were unlawful. When Brooks withdrew his consent and the law enforcement authorities said that dog was on its way and that a search warrant would be obtained, the seizure of the package, Brooks, and Limonja continued, see United States v. Place, 462 U.S. 696, 707 (1983), based upon nothing more than an "inchoate and unparticularized suspicion or 'hunch'" that the gift wrapped package found in the luggage of the car contained drugs. Terry v. Ohio, 392 U.S. 1, 27 (1967).

Not only was the continued seizure unlawful but the delay which occurred as the officers sought to validate their suspicions exceeded the bounds of reasonableness. The constitutional limits of the duration and scope of the detention subsequent to the revocation of Brooks' consent and prior to the discovery of the narcotics must be measured solely by its relation to the only valid purpose of the stop -- the issuance of a traffic citation. A police officer is allowed "to detain an individual stopped for (a traffic violation) only the time necessary to obtain satisfactory identification from the violator and to execute a traffic citation." United States v. Luckett, 484 F.2d 89,91 (9th Cir. 1973). In this case the extraordinary detention occurred because "the officers' subsequent actions were motivated entirely by their suspicions of narcotics," Recalde, 761 F.2d at 1455; thus, the detention bore no

relationship to the observed traffic violation.

In my view, the additional forty-eight minute detention of Brooks and Limonja, which occurred after Brooks revoked his consent and before the cocaine was discovered, was unrelated to the purpose of issuing a traffic citation. Keith testified that the traffic citations had been written ten minutes after the initial stop. However, when the dog was reported to have "alerted" on the package, the officers had not issued traffic citations even though one hour and twenty-six minutes had passed since officers stopped the vehicle. Until the time the dog alerted, the officers had observed no additional factors that would justify detention beyond the time Brooks revoked his consent.

The detention of Limonja and Brooks that occurred after the revocation of Brooks' consent became "in important respects indistinguishable from the traditional

arrest." Dunaway v. New York, 442 U.S. 200, 212 (1979). During the roadside detention, Keith did not return Brooks' or Limonja's identification papers or issue traffic citations. They were informed neither that their licenses and papers would be returned nor that they could leave. The issuance of the traffic citations some four hours after the vehicle had been stopped conclusively establishes that they could not have left. Thus, Limonja and Brooks were captives of the officers for whatever time the officers deemed necessary to investigate and probe their suspicions. "The inescapable conclusion to be drawn from the record is that the officers, lacking probable cause to arrest (Limonja) for (transporting illegal drugs,) seized (and) detained (them at the roaside) ... in the hope of developing sufficient probable cause." Recalde, 761 F.2d at 1456. "The police conduct in this case cannot be characterized as minimally

intrusive. This sort of police activity is an abuse of investigative detention and violates the Fourth Amendment." Id.

"(The) police procedures (became) qualitatively and quantitatively ... so intrusive with respect to (Brooks' and Limonja's) freedom of movement and privacy interests as to trigger the full protection of the Fourth and Fourteenth Amendments." Hayes v. Florida, 470 U.S. 811, 815-16 (1985). "In assessing whether a detention is too long in duration to be justified as an investigative stop ... it (is) appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." Sharpe, 470 U.S. at 686 (1985). Whether the police have acted with due diligence may be measured solely as a function of the amount of time that elapses. See Place, 462 U.S. at 709-10. Unlike the

twenty minutes detention in Sharpe, which was attributed entirely to the evasive actions of the defendant in that case, see 470 U.S. at 687-88, Limonja and Brooks bore no responsibility for the extensive detention to which they were subjected. Here the detention delay was solely attributable to the law enforcement officers; thus, "(t)he length of the detention ... alone precludes the conclusion that the seizure was reasonable." Place, 462 U.S. at 709.

The suggestion that Brooks consented to the search of the package after the illegal detention and the sniff by the narcotics detection dog must also fall. As earlier stated, the police "made a 'seizure' of (the package) for purposes of the Fourth Amendment when, following his refusal to consent to a search," the police called for assistance in arranging for the issuance of a search warrant and detained the package, Limonja, and Brooks while a dog was being located.

See Place, 462 U.S. at 707. Not only had Brooks been seized when he gave his second oral consent to open the package, but also the scope of a legitimate investigative stop had been exceeded.

Because the seizure and detention exceeded lawful limits, the consent that was obtained was tainted by the illegality. The evidence in this record does not establish a break in the causal connection between the illegal detention and the evidence obtained as a consequence of the illegality. See Dunaway, 442 U.S. at 217-18; Brown v. Illinois, 422 U.S. 590, 602-05 (1975). an alleged consent must be "sufficiently an act of free will to purge the primary taint" of the illegal detention. Brown, 422 U.S. at 602. The temporal proximity of the illegal detention and the "consent," the lack of intervening circumstances, and the flagrancy of the misconduct of the police all militate against the voluntariness of the consent.

See Dunaway, 442 U.S. at 218; Brown, 422 U.S. at 603-04.

Here, the alleged consent occurred during the illegal detention; moreover, there were no intervening circumstances established on this record. the flagrancy of the misconduct and illegal detention can be measured by the "quality of purposefulness" of the offiers' conduct. Brown, 422 U.S. at 605. Keith began "pacing" the suspected drug courier profile car in order "to get the ticket." he watched the car as it stopped to refuel and he had decided to call for a dog and stop the automobile before the driver committed a violation. Keith's intent to seize the automobile by some means is clearly evidenced by his own testimony that he informed Worrell that he would resume his "pacing" when the automobile left the service area. In order to accomplish their ultimate goal of searching the seized automobile, the officers forced the occupants to remain at

the roadside by not returning their licenses, papers, and by not issuing the traffic citations following the stop. To suggest that a detention which accompanied such a purposeful attempt to find a violation and which later continued for a period of forty-one minutes during the pursuit of an available narcotics dog is unobtrusive or reasonable is to close one's eyes to the command of the Fourth Amendment.

Moreover, the officers procured the "consent" only after Keith threatened to detain Limonja and Brooks further while he secured a search warrant. The coerciveness of the police action was apparent. From the outset this was "an 'expedition for evidence' admittedly undertaken 'in the hope that something might turn up.'" Dunaway, 442 U.S. at 218 (quoting Brown, 422 U.S. at 605).

> The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were

> warranted at all. The Fourth Amendment proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation. The entire deterrent purpose of the rule excluding evidence seized in violation of the Fourth Amendment rests on the assumption that "limitations upon the fruit to be gathered tend to limit the quest itself." Thus, evidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation.

Terry, 392 U.S. at 28-29 (citations omitted).

Finally, the majority incorrectly relies upon Place to hold that a search did not occur when the dog was used to sniff the package and the contents of the automobile. Place's holding that "exposure of respondent's luggage, which was located in a public place, to a trained canine - did not constitute a 'search' within the meaning of the Fourth Amendment" is inapposite to this case. 462 U.S. at 707 (emphasis added). Here the package that was sniffed was only in a public place because it was removed by the

authorities from the trunk of the automobile and detained on the hood of the idling police vehicle. The use of a narcotics detection dog to sniff a package that has been placed in the public domain by unlawful police action such as under the circumstances of this case constituted a warrantless search without probable cause[3]

---

[3]It should also be noted that in Place, the Court recognized that when personal luggage is seized from "the immediate possession of a suspect for the purpose of arranging exposure to a narcotics detection dog," police behavior may be less intrusive if the suspect is allowed to depart and leave his luggage with police because he "is technically still free to continue his travels or carry out other personal activities pending release of the luggage. Moreover, he is not subjected to the coercive atmosphere of custodial confinement or to the public indignity of being personally detained." 462 U.S. at 708; see also United States v. Alpert, 816 F.2d 958 (4th Cir. 1987). In the instant case, however, Limonja and Brooks were not offered the less intrusive alternative of leaving the package with the officers and proceeding with their travels. Instead they were subjected to a defacto arrest. Furthermore, even if Limonja and Brooks had been allowed to leave without the package "(t)he length of the detention of respondent's luggage alone precludes the conclusion that the seizure was reasonable in absence of probable cause." Place, 462 U.S.

authorities from the trunk of the automobile and detained on the hood of the idling police vehicle. The use of a narcotics detection dog to sniff a package that has been placed in the public domain by unlawful police action such as under the circumstances of this case constituted a warrantless search without probable cause.[3]

---

[3]It should also be noted that in Place, the Court recognized that when personal luggage is seized from "the immediate possession of a suspect for the purpose of arranging exposure to a narcotics detection dog," police behavior may be less intrusive if the suspect is allowed to depart and leave his luggage with police because he "is technically still free to continue his travels or carry out other personal activities pending release of the luggage. Moreover, he is not subjected to the coercive atmosphere of custodial confinement or to the public indignity of being personally detained." 462 U.S. at 708; see also United States v. Alpert, 816 F.2d 958 (4th Cir. 1987). In the instant case, however, Limonja and Brooks were not offered the less intrusive alternative of leaving the package with the officers and proceeding with their travels. Instead they were subjected to a defacto arrest. Furthermore, even if Limonja and Brooks had been allowed to leave without the package "(t)he length of the detention of respondent's luggage alone precludes the conclusion that the seizure was reasonable in absence of probable cause." Place, 462 U.S.

For these reasons, I would hold that the motions to suppress should have been granted.

---

at 709.

## APPENDIX B

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 17th day of January, 1990.

Margaret Mary Limonja and
Raymond James Brooks, Appellants,

against Record No. 891132
Court of Appeals No. 1230-86-2

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach,

Clerk By:

Deputy Clerk